IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TENNESSEE
WESTERN DIVISION

UNITED STATES OF AMERICA,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	**No. 04-20017-D**
	)	
RANDE LAZAR, M.D., d/b/a OTOLARYNGOLOGY CONSULTANTS OF MEMPHIS,	)	
Defendants.	)	

ORDER GRANTING DEFENDANT'S MOTION TO STRIKE SURPLUSAGE

An indictment was returned by the grand jury on January 20, 2004 charging the defendant, Rande H. Lazar ("Lazar"), M.D. d/b/a Otolaryngology Consultants of Memphis, with devising and executing a scheme to defraud and obtain money from health care benefit programs. The indictment charges that Lazar falsified or caused to be falsified medical reports to justify billing and billed for procedures that were not performed by him, were not necessary, or were not performed at all.

Before the court is the motion of Lazar, filed August 27, 2004, to strike the surplusage from ¶ 12 of the indictment and other allegations from all 115 counts of the indictment, pursuant to Rule (7)(d) of the Federal Rules of Criminal Procedure. This motion was referred to the United States Magistrate Judge for determination. For the reasons that follow, the motion is granted.

Rule 7(d) provides that "[t]he court on motion of the defendant may strike surplusage from the indictment or information." FED. R. CRIM. P. 7(d). The determination of whether certain language from an indictment is surplusage is within the discretion of the court. *United States v. Kemper*, 503 F.2d 327, 329 (6th Cir. 1974). Surplusage may be stricken from the indictment under rule 7(d) when the "the indictment contains non-essential allegations that could prejudicially impress the jurors." *Id.* It is only proper to grant a motion to strike surplusage where the words stricken are not essential to the charge. *Id*. Furthermore, "[if] language in the indictment is information which the government hopes to properly prove at trial, it cannot be considered surplusage no matter how prejudicial it may be (provided, of course, it is legally relevant)." *United States v. Pierce*, 920 F.2d 934, at *6 (6th Cir. 1990)(citing *United States v. Thomas*, 875 F.2d 559, 562 n.2 (6th Cir. 1989)(quoting *United States v. Climatemp, Inc.*, 482 F.Supp. 376, 391 (N.D. Ill. 1979)).

Lazar contends that the language contained in ¶ 12 of the indictment should be stricken because it will mislead the trier of fact and it will be unfairly prejudicial to his defense. The challenged language in ¶ 12 of the indictment relates to a set of guidelines for surgery call the Clinical Indicators Compendium ("CIC"). According to the indictment, the CIC identifies when

surgical intervention is appropriate or recommended.

The government claims that the CIC is essential to its claim that Lazar performed unnecessary sinus surgeries between 1996 and January of 2004. Relying on the Sixth Circuit's unpublished opinion in *United States v. Pierce* that is quoted above, the government states that they will attempt to prove at trial that the CIC sets forth a recommended standard of care, and, therefore, the language relating to the CIC in ¶ 12 of the indictment is not surplusage no matter how prejudicial it may be because it is relevant to the charges.

The indictment states that The American Academy of Otolaryngology has published the CIC guidelines since 1988. According to Lazar, the CIC contained no guidelines on pediatric sinus surgery until 2000. Thus, ¶ 12 of the indictment for all counts coming before the publication of the CIC guidelines is misleading. If the CIC guidelines were not in existence until 2000, then they are non-essential to the charges occurring between 1996 and 1999, and they are irrelevant to the charges as well. If the jury is led to believe that the CIC contained the requisite standard of care between 1996 and 1999, despite the fact that such guidelines did not exist, then jury confusion and unfair prejudice may result. Accordingly, the language in ¶ 12 of the indictment relating to CIC should be stricken from all counts arising between

1996 and 1999, or before the publication of the CIC guidelines on pediatric sinus surgery.

Next, Lazar moves to strike from counts 1-115 all factual allegations that do not concern the specific scheme alleged in that particular count. Lazar contends that juror confusion may result because each count incorporates all forty (40) factual allegations describing the four different schemes despite the fact that some parts of the allegations are irrelevant to the particular scheme at issue. Because there was no response by the government to this contention, then the court assumes that the government has no opposition to Lazar's request. Accordingly, all introductory factual allegations not relating to the particular scheme specified in each count of the indictment should be stricken.

IT IS SO ORDERED this 26th day of October, 2004.

DIANE K. VESCOVO
UNITED STATES MAGISTRATE JUDGE